

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Appeal of the Invasive
Species/Infested Waters Civil Citation
#172343 - Charles Roy Peterson

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter came on for a Prehearing Telephone Conference before Administrative Law Judge Jeanne M. Cochran on January 11, 2013. Conservation Officer Jackie Glaser participated in the Conference on behalf of the Department of Natural Resources (DNR). Charles Peterson participated on his own behalf and without counsel. The parties agreed that no formal hearing would be needed and that the Administrative Law Judge could make a recommendation based on the record created during the Prehearing Telephone Conference. The parties were placed under oath, and their testimony was taken. The OAH record closed at the conclusion of the conference call on January 11, 2013.

STATEMENT OF THE ISSUE

The issue presented in this matter is whether Charles Peterson was properly issued a civil citation under Minn. Stat. § 84D.13 on October 25, 2012 for unlawfully possessing or transporting prohibited invasive species other than an aquatic macrophyte on September 13, 2012.

The Administrative Law Judge concludes that the DNR has failed to establish by a preponderance of the evidence that Mr. Peterson violated Minn. Stat. § 84D.13 on September 13, 2013 and recommends that the Commissioner RESCIND the Citation.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. On October 25, 2012, Officer Glaser issued a citation to Charles Roy Peterson for unlawfully possessing or transporting an invasive species other than an aquatic macrophyte. The citation lists the date and time of the violation as September 13, 2012 at 7:15 p.m. The citation also notes that the violation occurred at the Lotus Lake public access in Carver County, Minnesota.¹

¹ DNR Invasive Species/Infested Waters Citation No. 172343.

2. Officer Glaser issued the citation based on a report from Karen Kelly, a watercraft inspector who works for the City of Chanhassen. Ms. Kelly has been trained in identifying zebra mussels.²

3. On September 30, 2012, Ms. Kelly was working at the public access on Lotus Lake in Chanhassen. At 7:15 p.m. on that day, Ms. Kelly reported that she inspected a boat that was planning on launching and found a piece of milfoil with what she believed to be a zebra mussel attached to it. The milfoil was found on the trailer of the boat. Ms. Kelly reported that the boat belonged to Charles Peterson and his wife, who live on Lotus Lake. Ms. Kelly showed the plant sample to Mr. and Mrs. Peterson, and they did not launch their boat. Ms. Kelly did not keep the milfoil or what she believed was the zebra mussel because she was afraid she would be cited for transporting an invasive species.³

4. Prior to arriving at the Lotus Lake public access on September 30, 2012, Charles Peterson and his wife had been boating on Lake Minnetonka. Lake Minnetonka is known to be infested with zebra mussels.⁴

5. After exiting Lake Minnetonka, the Petersons washed their boat off with a power-washer that was available at the public access at Grey's Bay on Lake Minnetonka. After washing their boat off, the boat and trailer were inspected by the Petersons and the watercraft inspectors at Lake Minnetonka.⁵ Mr. Peterson also removed the drain plug from the boat at the public access on Lake Minnetonka prior to leaving.⁶

6. The Petersons then drove to the public landing at Lotus Lake. When they arrived at the public landing, Ms. Kelly inspected the boat with both Mr. and Mrs. Peterson. They all agreed that there were no weeds on the boat, and Ms. Kelly gave the Petersons the "all-clear" to launch the boat.⁷

7. As they were about to launch the boat, Ms. Kelly asked the Petersons where they had been boating before coming to Lotus Lake. They responded that they had been boating at Lake Minnetonka. Ms. Kelly then got a flashlight out, looked around the boat again, and came back with a fresh leafy green weed which she identified as milfoil. Ms. Kelly said the weed was between the pads of the trailer and the boat. Mr. Peterson was surprised that she had found it there because they had all just looked at the entire boat for weeds, including in that area.⁸

² Testimony of Officer Jackie Glaser (January 11, 2013).

³ Test. of Officer Glaser.

⁴ Test. of Officer Glaser.

⁵ Testimony of Charles R. Peterson (January 11, 2013).

⁶ Test. of C. Peterson.

⁷ Test. of C. Peterson.

⁸ Test. of C. Peterson.

8. On the plant was a very small object that Ms. Kelly said was a zebra mussel. Mr. Peterson and his wife disagreed. Mrs. Peterson, who has a background in biology, told Ms. Kelly that the small object was a piece of sand.⁹

9. The Petersons then asked Ms. Kelly what they should do. Ms. Kelly told them that they could launch their boat at that time, but it would be better to wait a week. They then voluntarily decided not to launch their boat, and left the boat launch.¹⁰

10. The Petersons are supportive of boat inspections to keep down milfoil and invasive species. They care very much about keeping zebra mussels out of Lotus Lake.¹¹

Based on these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. This matter is properly before the Administrative Law Judge and the Commissioner of Natural Resources pursuant to Minn. Stat. §§ 14.50 and 116.072, subd. 6.

2. Conservation officers are authorized to issue citations to persons who unlawfully transport prohibited invasive species or aquatic macrophytes.¹² Minnesota law imposes a penalty of \$500 for unlawfully transporting an invasive species other than an aquatic macrophyte.¹³

3. Pursuant to Minn. Stat. § 84D.13, subd. 8, an appeal of a civil citation shall be considered under the procedures in Minn. Stat. § 116.072, subd. 6, if the person who received the citation requests a hearing within 15 days after receipt of the citation. Mr. Peterson filed a timely appeal and request for hearing.

4. The DNR has the burden to prove the allegations in the citation by a preponderance of the evidence.¹⁴

5. The DNR has failed to demonstrate a violation of Minn. Stat. § 84D.13 as set forth in Citation No. 172343 by a preponderance of the evidence.

Based upon these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

⁹ Test. of C. Peterson.

¹⁰ Test. of C. Peterson.

¹¹ Test. of C. Peterson.

¹² Minn. Stat. § 84D.14, subd. 4(1).

¹³ Minn. Stat. § 84D.14, subd. 5(a)(3).

¹⁴ Minn. R. 1400.8608.

RECOMMENDATION

The Administrative Law Judge recommends that Invasive Species/Infested Waters Civil Citation No. 172343 issued to Charles Roy Peterson be RESCINDED.

Dated: January 28, 2013

s/Jeanne M. Cochran

JEANNE M. COCHRAN

Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

Pursuant to Minn. Stat. § 116.072, subd. 6(e), the Commissioner may not issue a final order until at least five days after receipt of the report of the Administrative Law Judge. The persons to whom the order is issued may within those five days comment to the Commissioner and the Commissioner will consider the comments. The final order of the Commissioner may be appealed, pursuant to Minn. Stat. §§ 14.63 and 14.69.

MEMORANDUM

In the view of the Administrative Law Judge, the record in this case is insufficient to find a violation of Minn. Stat. § 84D.13 as set forth in Citation No. 172343 for two reasons. First, the citation notes that the violation occurred on September 13, 2012. There is no evidence in the record, however, to find that a violation occurred on September 13, 2012. All the testimony in this case relates to events occurring on September 30, 2012.

Second, even if the citation had correctly noted September 30, 2012 as the date of the violation, the record in this case is still not sufficient to find a violation of Minn. Stat. § 84D.13. The DNR's citation is based solely on a report from a city watercraft inspector. The city watercraft inspector did not keep the material that was removed from the boat. Thus, Officer Glaser had no way to confirm that the plant material removed from the boat did in fact contain a zebra mussel when she issued the citation. In addition, while the city watercraft inspector was trained in the identification of zebra mussels, she did not testify at the hearing. Thus, there is no evidence in the record as to why or how the city inspector concluded that the tiny object on the plant material in question here was a zebra mussel. Finally, Mr. Peterson testified credibly that he and his wife believed that the tiny object in question looked like a piece of sand. Mr. Peterson also testified that his wife has a background in biology. For these reasons, it is the opinion of the undersigned, the DNR has not shown by a preponderance of the

evidence that Mr. Peterson “possessed or transported” a zebra mussel, as alleged in the citation.

J. M. C.